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EX PARTE OR LATE FILED

January 12, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, D.C. 20554

RE: Ex Parte
CC Dkt. No.96-149 Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended.

Dear Ms. Roman Salas:

A copy of the attached document was provided to Craig Brown of the Common Carrier Bureau's Policy Division on Friday, January 9, 1998.

Two copies of this Notice are being submitted to the secretary of the FCC in accordance with Section 1.1206(a)(1) of the Commission's rules.

Sincerely,

Betsy J. Brady

Attachments

cc: Craig Brown

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M E M O R A N D U M

RE: Status of Bell Operating Companies as "Dominant Carriers"

DATE: January 6, 1998

In light of the recent district court decision holding Sections 271 and 272, inter alia, of the 1996 Telecommunications Act to be unconstitutional "bills of attainder,"[1] the question has arisen whether a Bell Operating Company ("BOC") that seeks to provide long-distance service in reliance on that decision would be a "dominant" or "non-dominant" carrier. The question is potentially relevant because, under the FCC's rules, a "non-dominant" carrier may file its interstate long-distance tariffs on one-day's notice -- i.e., it may begin providing service pursuant to such a tariff one day after the tariff has been filed, unless the tariff is suspended before it would otherwise have become effective. By contrast, the FCC's rules subject dominant carriers to longer advance-notice requirements. Under its rules, therefore, the FCC has substantially more time to exercise its authority under Section

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[1] See Memorandum Opinion and Order, SBC Communications, Inc. v. Federal Communications Commission, et al., No. 7:97-CV-163-X (N.D.Tex. Dec. 31, 1997) ("SBC"). No judgment or injunction has yet been issued in connection with that decision. The government has indicated its intention to file a motion seeking a stay of any such judgment or injunction, and intervenors supporting the government have already filed such a motion themselves. The issue addressed in this memorandum will arise only insofar as a judgment or injunction issues and is not stayed.

204 of the Communications Act to suspend a tariff, and thus to prevent a carrier from providing service under it, when the carrier is a dominant one.

The answer to the question is clear. If a BOC or BOC affiliate that has not received approval from the FCC under Section 271 sought to provide long-distance service in reliance on the recent district court decision, it would have to satisfy the requirements applicable to dominant carriers. In 1984, the FCC stated:

> The BOCs currently are barred by the MFJ from providing interLATA services. See United States v. Western Electric Co., Civ. Action No. 82-0192 (D.D.C. July 26, 1984). If this bar is lifted in the future, we would regulate the BOCs' interstate, interLATA services as dominant until we determined what degree of separation, if any, would be necessary for the BOCs or their affiliates to qualify for nondominant regulation.

See Fifth Report and Order, Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 98 F.C.C.2d 1191, 1198 n.23 (1984) ("Fifth Report and Order"). Because the FCC has made no such determination that would be applicable in the present circumstances, dominant carrier classification would still apply.

SBC or U S WEST -- the two RBOCs that were parties to the SBC case -- might claim that the FCC has declared that BOC affiliates would be "non-dominant" in the long-distance market, but any such claim would be baseless. As the Fifth Report and Order stated, BOC affiliates are dominant except insofar as the FCC declares otherwise. And the FCC has declared otherwise only with respect to one category of BOC affiliates: those that both are granted FCC approval under Section 271 of the Act, and that will be subject to the statutory safeguards of Section 272 of the Act. Any BOC relying on the SBC decision, by contrast, would not have satisfied Section 271 or be subject to Section 272, for those were among the very provisions that decision invalidates.

The FCC's order on this subject makes that very plain. See Order, Regulatory Treatment of LEC provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket 96-149 (April 18, 1997), ("BOC Section 272 Affiliate Non-Dominance Order"). That order found that BOC "section 272 interLATA affiliates" would be non-dominant, and the Commission specified that "our findings in this order apply only to affiliates established in conformance with section 272(a)(1)."[2] Indeed, its conclusion that the BOC affiliates would lack the type of market power necessary for treatment as dominant carriers rested crucially on the fact that the BOCs would have satisfied Section 271 and would be subject to the requirements of Section 272. See BOC Section 272 Affiliate Non-Dominance Order, ¶ 6 ("[i]n light of the requirements established by, and pursuant to, sections 271 and 272, together with other existing Commission rules, we conclude that the

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[2] See BOC Section 272 Affiliate Non-Dominance Order, ¶ 4 & n.12.

BOCs will not be able to use, or leverage, their market power in the local exchange or exchange access markets to such an extent that their section 272 interLATA affiliates could profitably raise and sustain prices of in-region, interstate, domestic, interLATA services significantly above competitive levels by restricting the affiliate's own output"); id., ¶ 82 (same); id., ¶ 134 ("We therefore see no reason to impose dominant carrier regulation on the BOC interLATA affiliates, given that section 272 contains numerous safeguards designed to prevent the BOCs from engaging in improper cost allocation, discrimination, and other anticompetitive conduct. We emphasize that our decision to accord non-dominant treatment to the BOCs' provision of in-region, interLATA services is predicated upon their full compliance with the structural, transactional, and nondiscrimination requirements of section 272 and our implementing rules"); id. ¶¶ 91, 104-105, 108, 112-116, 128 (relying in substantial part upon specific Section 272 safeguards to respond to concerns about discrimination and cross-subsidization); id., ¶¶ 117-118 (relying on adjudicatory authority under Section 271(d)(6)).

Indeed, SBC's own comments in the FCC's proceeding rested on precisely the same premise. SBC stated:

> Some commenters suggest that BOC interLATA affiliates should be shackled by dominant carrier regulation that is presently applicable to no one. Before a BOC affiliate is permitted to offer in-region interLATA services, the Commission will have determined either that the Section 272 interLATA provider's affiliated BOC is subject to facilities-based competition

> under Section 271(c)(1)(A) or that the BOC's network has been opened to make it possible for such competition to occur pursuant to Section 271(c)(1)(B).
>
> Rather than accept Congress' decision that following the implementation of Sections 251, 252, and 271 and the establishment of a Section 272 affiliate that the "bottleneck" will have been sufficiently opened and become sufficiently immune to discrimination, numerous incumbent IXCs attempt to convince the Commission to minimize the legitimate effects of BOC affiliate entry. Congress has recognized what the IXCS commenting in this docket have not: when the BOCs have passed through the Section 251, 252, and 271 gauntlet, their interLATA affiliates should be subject only to Section 272 regulation.

See Reply Comments of SBC Communications, Inc., pp. 23-24.

SBC might maintain that, so long as it commits voluntarily to comply with the requirements of Section 272, it should be afforded non-dominant treatment. But that suggestion would be frivolous. First, as the foregoing citations to the BOC Section 272 Affiliate Non-Dominance Order make explicit, the FCC relied for its finding that BOC Section 272 affiliates would not have the type and degree of market power necessary for "dominant carrier" treatment not only on Section 272, but on Section 271 as well. Indeed, the FCC expressly relied not only on Section 271 generally (see, e.g., ¶¶ 6, 82), but also on Section 271(d)(6) specifically (see ¶¶ 117-118). Section 271(d)(6) authorizes the FCC to revoke a BOC's long-distance approval, or impose other sanctions, if at any point the BOC ceases to meet the conditions for approval. That provision, however, was declared unconstitutional along with the rest of Section 271.

Second, even if the FCC's order had been premised solely on Section 272 (as it was not), there is a world of difference between a voluntary commitment to comply with the requirements of Section 272, and a statutory obligation to do so. Indeed, Section 271 itself requires that the FCC make an affirmative finding, before it may approve a BOC's Section 271 application, that the BOC will act in "accordance with the requirements of Section 272," and Ameritech's Section 271 application for Michigan was rejected in part because the FCC could not make such a finding -- despite a stated commitment by Ameritech to comply with Section 272.[3] The BOC Section 272 Affiliate Non-Dominance Order presumes that such a finding will have been made by the FCC -- not merely that assertions that it will comply with Section 272 will be made by the BOC -- before there is a "Section 272 affiliate" that is classified non-dominant.

In all events, even if SBC might claim that such commitments should be sufficient to entitle it to non-dominant treatment, the FCC has not so determined. Its order addressed a substantially different set of circumstances. Under the Fifth Report and Order, SBC and any SBC affiliate will therefore continue to be treated as dominant unless and until it either satisfies the terms of the BOC Section 272 Affiliate Non-Dominance Order -- as it

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[3] See Memorandum Opinion and Order, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, ¶¶ 344-373.

does not today -- or persuades the FCC, in a new rulemaking proceeding, to extend non-dominant treatment to the very different situation potentially presented by the recent district court decision.